90-119

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

CITIZENS FOR FAIR UTILITY REGULATION,
Petitioner

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, *Respondents*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED

Petitions to intervene in licensing proceedings for nuclear power plants are timely if filed within thirty days of the date on which notice of such proceedings is published in the Federal Register. Petitions filed after that period are untimely and will not be granted unless a balancing of five factors set out in the regulations favors late intervention.

I. When a late filed petition to intervene seeks to address the issue of good cause for late filing by reference to the highly irregular circumstances surrounding the withdrawal of the only intervenor, is the Commission free under 10 C.F.R. § 2.714 (1990) to ignore such circumstances in its determination of the good cause question?

II. Is the refusal of the Commission to consider the illicit qualities of the settlement agreement that resulted in the withdrawal of the only intervenor an impermissible burden on the rights of petitioner, who in every way has standing to participate in licensing proceedings, to due process of law under the fifth amendment and to the right to a hearing guaranteed in the Atomic Energy Act of 1954?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Citizens for Fair Utility Regulation and the respondents United States Nuclear Regulatory Commission and the United States. Intervenors below were Joseph Macktal and Texas Utilities Electric Company.

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CITIZENS FOR FAIR UTILITY REGULATION,
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v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA, *Respondents*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petitioner Citizens for Fair Utility Regulation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on April 12, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 898 F.2d 51 (5th Cir. 1990), and is reprinted in the appendix hereto, p. A-1, *infra*.

The opinion of the United States Nuclear Regulatory Commission is reported at 28 N.R.C. 605 (1988), and is reprinted in the appendix hereto, p. B-1, *infra*.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254 (Supp. 1990). The judgment to be reviewed was entered April 12, 1990.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THE CASE

The constitutional provisions, statutes, and regulations involved in this case, in pertinent part, are as follows.

The fifth amendment to the United States Constitution provides: "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ."

Section 189 of the Atomic Energy Act of 1954, 42 U.S.C. § 2239(a) (Supp. 1990) states: "In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding."

Section 2.714 of Title 10, Code of Federal Regulations, titled "Intervention," states: "Any person whose interest may be affected by a proceeding and who desires to participate as a party shall file a written petition for leave to intervene. In a proceeding noticed pursuant to § 2.105 [this was such a proceeding], any person whose interest may be affected may also request a hearing. The petition and/or request shall be filed not later than the time specified in the notice of hearing. . . . Nontimely filings will not be entertained absent a determination by the Com-

mission . . . that the petition and/or request should be granted based upon a balancing of the following factors in addition to those set out in paragraph (d) of this section: (i) Good cause, if any, for failure to file on time. (ii) The availability of other means whereby the petitioner's interest will be protected. (iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record. (iv) The extent to which the petitioner's interest will be represented by existing parties. (v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding."

STATEMENT OF THE CASE

On July 13, 1988, contested adjudicatory licensing proceedings for the Comanche Peak Nuclear Power Plant were dismissed following a settlement agreement between intervenor Citizens Association for Sound Energy (hereinafter referred to as CASE) and TU Electric. The atomic safety and licensing board which had been conducting hearings was dissolved. That same date Citizens for Fair Utility Regulation (hereinafter referred to as CFUR) submitted to the Board a request for a hearing and petition to intervene. The presiding officer advised CFUR to withdraw that petition without prejudice to a later filing, which CFUR did. Tr. 25202.

On August 11, 1988, CFUR filed with the Nuclear Regulatory Commission (hereinafter referred to as the Commission) a petition to intervene and request for a hearing; CFUR filed a first supplement on September 12, 1988, and a second supplement on December 16, 1988. On December 21, 1988, the Commission denied CFUR's

request to intervene, finding that CFUR did not meet the regulatory standards for late intervention. On April 12, 1990, the court of appeals upheld the Commission's denial of CFUR's request to intervene.

The Commission issued TU Electric an operating license on February 9, 1990. CFUR's applications for stays of the Commission's issuance of the license were denied by the Commission and the court of appeals. CFUR's application for a stay of that part of the license authorizing fission of the nuclear fuel for low power testing was denied by Mr. Justice White on March 30, 1990.

The significance of this case lies in the unprecedented nature of the settlement between the only intervenor then a party–CASE–and the applicant for the operating license. The settlement resolved no safety issues. Rather, the applicant for the license paid $10 million to CASE and to individuals with pending Department of Labor and state court complaints of retaliation, allowed a CASE member to sit on a review committee at the plant, and agreed to pay for a consultant for CASE to employ to assist it in monitoring the construction and operation of the plant. In return the applicant received a license to operate a nuclear power plant – the natural and anticipated consequence of having the only adverse party withdraw from the proceedings. The atomic safety and licensing board declared the proceedings closed and dissolved itself, eliminating all future hearings that had been scheduled.

The agreement between CASE, the individuals with pending claims, and TU Electric, reveals its meretricious nature when the relationship among the attorneys

for the individuals and the attorneys for CASE is examined. They were the same. The three lawyers representing the individuals with retaliation claims had contingent fee contracts with their clients. Two of those lawyers also represented CASE, and the third, and his wife, were on the CASE board of directors.

TU Electric offered to settle the individual cases only if CASE would withdraw from the proceedings, relinquish its status as a party intervenor, and agree not to oppose TU Electric in any NRC forum. CASE would retain the privilege of filing a petition with the Commission under 10 C.F.R. § 2.206, a right enjoyed by "any person," regardless of standing or interest. An adverse ruling on a 2.206 petition is not reviewable.

The Commission's express refusal to recognize or consider this issue in its review of CFUR's petition to intervene, when it was fully addressed in CFUR's petition, is the basis of CFUR's Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The Nuclear Regulatory Commission is a major government agency with wide-ranging responsibilities in the areas of national energy policy and public health and safety. It is charged with protecting the public from the perils that arise from the use of a fuel that is very dangerous and that produces waste that is very dangerous, especially to people who reside near nuclear power plants. CFUR is composed of and represents such people.

The Atomic Energy Act of 1954 explicitly creates the right of persons such as CFUR and its members to a

hearing and to status as parties in proceedings in which they have an interest: ". . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding." 42 U.S.C. § 2239(a) (Supp. 1990). Of course it is well-established that an agency with such a charge does not violate either the due process clause of the fifth amendment nor the act of congress that creates a right in citizens to be heard merely by creating and applying regulations designed to promote the orderly conduct of agency business. *Simmons v. Arkansas Power & Light Co.*, 655 F.2d 131 (5th Cir. 1981).

Such regulations are common, and many agencies other than the Nuclear Regulatory Commission have regulations that govern intervention in proceedings before the agency. Some agencies and the equivalent regulations to 10 C.F.R. § 2.714 (1990) are the Department of Transportation, 14 C.F.R. § 302.15 (1990); Federal Energy Regulatory Commission, 18 C.F.R. § 385.214 (1990); Federal Communications Commission, 47 C.F.R. § 1.223 (1989); and the Interstate Commerce Commission, 49 C.F.R. § 1112.4 (1989). The role of the private intervenor has become an established institutional feature of administrative jurisprudence, and the error of the Commission and the court of appeals in this case, if allowed to stand, will become widely known precedent to the harm of every regulatory scheme referred to above.

The settlement between CASE and TU Electric did not resolve any safety issues whatsoever, it offends even the most rudimentary understanding of conflicts of inter-

est, and it has allowed a fundamental flaw, as that term is used in Commission precedent and case law, to persist up to this time, with deleterious consequences for the integrity of the fact-finding process in the NRC and a myriad of other agencies with similar regulations. The settlement also created an unmistakable increase in the likelihood that the Comanche Peak Nuclear Power Plant will malfunction and physically harm CFUR members.

In 1979, three citizen groups were granted intervenor status in the licensing proceedings connected with the Comanche Peak plant. CFUR and another organization withdrew as parties in 1982, leaving CASE as the only party adverse to the utility company. CASE, over the next several years, by its vigorous participation in adversarial proceedings before an atomic safety and licensing board, brought to light major design defects and construction problems at the plant. This was possible because the regulations provide for adversarial hearings. 10 C.F.R. Part 2. Discovery, subpoena power, cross-examination under oath, and the right to produce evidence in a forum of record, are particularly useful in discovering falsehoods and exposing coverups. The law has long known these to be superior tools for testing opinion and for building a record of facts that is more reliable than that likely to be produced by an unopposed party with much to gain from a favorable outcome of the proceedings. "If the Commission is properly to discharge its duty in this regard, the record on which it bases its determination must be complete." *Scenic Hudson Preservation Conference v. F.P.C.*, 354 F.2d 608, 612 (2d Cir. 1965).

In this case TU Electric admitted at the July 13, 1988 hearing that CASE's use of the adversarial system had materially improved the safety of the plant, and that many very significant flaws would not have come to light if only the applicant for the license and the NRC staff participated in deciding what information was relevant and what not. Tr. 25293. For example, it was through discovery that CASE brought to light trending documents possessed by the NRC staff, and it was the adversarial proceeding that allowed an intervenor to discover these important documents and use them to reveal an overall pattern of quality control breakdown that was not being promptly identified or corrected.

This was also how the Board learned of the defective design of installed pipe supports which became a major safety issue in the proceedings. But for the adversarial process, the defective and dangerous pipe support threat would not have been discovered. The presiding officer said the applicant would not have admitted to it, and the NRC staff did not find it. Board Memorandum & Order, LBP-83-81, December 28, 1983.

Throughout the licensing process of the Comanche Peak nuclear power plant, TU Electric has gone on record assuring the NRC staff that it was a well-built and well-designed plant, and that the plant met the quality assurance and quality control requirements of 10 C.F.R. Part 50, appendix B. Until July 13, 1988, that assurance never stood up under the careful scrutiny and challenges of the adversarial process.

In December 1983, when TU Electric and the NRC staff were ready to certify the plant for licensing, the

Appendix B
Opinion of the United States Nuclear Regulatory Commission – December 21, 1988

Board ordered TU to correct outstanding design deficiencies and prove to the Board that the plant was constructed according to the requirements of the regulations. By 1985, TU still had not provided such proof, and, instead, requested suspension of the licensing hearings.[1] The request was granted. In April 1988, CASE filed with the Board its statement of preparedness and intent to litigate eighteen outstanding safety issues. On June 1, 1988, in a prehearing conference, CASE agreed that it would be able to accept TU's redesign plan for the pipe supports (one of the eighteen issues raised in April), but stated that it had reached no agreement on the implementation of the redesign plan for the pipe supports, nor on any of the other safety issues. Tr. 25163-80.

On June 30, 1988, CASE, the sole remaining intervenor, negotiated away its only right under the Atomic Energy Act, the right to a hearing, for a "program" for resolving the issues of safety and a commitment by TU that it would correct all of the deficiencies in design and construction prior to licensing. Tr. 25248, 25251, 25280. CASE received $4.5 million for giving up this statutory right and its witnesses received $5.5 million to settle their labor claims against TU and its prime contractor, Brown and Root. The attorneys for the witnesses, of course, received a substantial contingent fee subsequent to their other client, CASE, surrendering its rights to a hearing.

[1] In fact, CFUR believes TU was simply unable to provide the required proof, then and now, and such inability fueled its efforts to settle with CASE.

Because of the settlement, the hearings were never resumed and, except for the pipe support redesign plans, none of the issues referred to by CASE or the Board were resolved prior to the settlement.

Attorneys for CASE and TU Electric admitted at the settlement hearing of July 13, 1988, and CASE has continuously acknowledged since the settlement,[3] that the substantive safety issues (those that CASE was previously prepared in April to litigate to completion) were *not* resolved by the settlement. Tr. 25248-50.[4] This kind of settlement – monetary and quasi-private in nature, and not resolving the substantive issues critical to the public interest – is neither contemplated by the regulatory scheme nor the Commission standards governing licensing proceedings.

While it is true that Commission and NRC regulation encourage the settlement of issues in controversy, Commission standards require such settlements to be "fair, consistent with NRC regulations and in the public interest." *Rockwell International Corporation (Rocketdyne Division)*, ALAB-925, 30 N.R.C. 709, 721 (1989). In that case the atomic safety and licensing appeal board noted that ". . . NRC proceedings are not merely contests between private litigants, but rather are intended to

[3] On the eve of licensing on February 6, 1990, CASE filed a 2.206 petition to delay the licensing of the plant, stating that it had "no confidence that [TU Electric's] promises would provide reasonable assurance that public health and safety will be protected." The petition was denied.

[4] George Edgar, attorney for TU Electric, said: "We have not reached agreement on the merits. We have reached agreement on a process for resolution of issues." Tr. 25248. Tony Roisman, attorney for CASE, said: "This is not an agreement . . . to resolve any substantive issue. Every issue that CASE believed was of concern a month ago, it still believes is a concern today." Tr. 25250.

a compelling showing as to the remaining four factors. Although two of the factors did weigh in CFUR's favor, these two factors are to be accorded less weight. Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), CLI-86-8, 23 NRC 241 (1986).

III. CONCLUSION

The action of the NRC in denying the late-filed petition for intervention is not arbitrary, capricious, or contrary to existing law. Having failed to demonstrate good cause for the late filing, CFUR was obligated to make a compelling showing as to the remaining factors. The NRC did not commit reversible error in concluding that such a showing had not been made. Consequently, we affirm.

AFFIRMED

resolve matters in controversy in a manner that will protect the health and safety of the public generally." *Id.* In *Rockwell* the appeal board was chastising the same judge who presided over the Comanche Peak proceedings which resulted in the settlement, because he had suggested to the intervenors and Rockwell that he ". . . was available to facilitate a settlement and that 'these negotiations could be private and confidential' as a way of discussing, among other things, 'what information should be made available to the public.'" *Id.*

This settlement is unprecedented in NRC proceedings. Commission standards contemplate negotiations to "resolve contentions, settle procedural disputes, and better define issues." *Statement of Policy on Conduct of Licensing Proceedings*, 13 N.R.C. 452 (1981). The standards do not address settlements for monetary compensation in exchange for withdrawal of contentions and closing proceedings on public safety issues.

Private parties intervening in licensing proceedings represent the public interest as well as their own. In light of the important institutional role private intervenors fulfill in administrative proceedings, particularly those licensing a nuclear power plant, settlements that remove intervenors and leave only an applicant for a license as a party must be subject to close scrutiny to assure the public interest is represented. At the very least, the circumstances surrounding the withdrawal of intervenors should be taken into account and evaluated when another party's motion to intervene follows upon the withdrawal of an intervenor. In *WTL Broadcasting Co. v. F.C.C.*, 376 F.2d 782 (D.C. Cir. 1967), four parties applied for construction permits for radio stations in

Florida; three of the applicants withdrew or were dismissed, leaving only one applicant in the proceeding. Another party attempted to intervene, and intervention was denied by the Commission. On petition for review, the court of appeals reversed and remanded the case to the Commission so that it could exercise its discretion in light of the benefit to the public of a "private opposition to the applicant to assert the public interest factors as an adversary sees them. . . ." *Id.* at 785.

In *Metropolitan Edison Company* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 N.R.C. 327 (1983), the Commission said regarding a late filed intervention petition that ". . . recent events may be a key factor in establishing 'good cause' for late intervention." *Id.* at 331. The Commission stated: "It is important to note that the other four factors to be considered and weighed in late intervention are predicated on the petitioner having a cognizable interest in the proceeding which would justify participation by a late intervenor." *Id.*

In the July 13, 1988 proceedings which dismissed the Comanche Peak licensing hearings, the presiding judge, in noting that CFUR had just learned of the stipulation and agreement between CASE and TU Electric, said: ". . . the fact that you have just learned of this stipulation may help to form good cause for late filing." Tr. 25198. Thus even the presiding judge who dismissed the proceedings expressly recognized that the settlement may constitute a "recent event" justifying late intervention. The Commission's failure to examine seriously the nature and timing of the private settlement agreement ending public licensing proceedings in CFUR's petition

to intervene is a significant issue with profound implications in nuclear licensing proceedings: whether those proceedings are mere forums for resolving private disputes or whether their purpose is to assure full airing and resolution of issues critical to public safety and well-being.

The Commission has recently reaffirmed the statutory right to a hearing on issues material to licensing by reopening hearings to consider evidence of a fundamental flaw in an emergency preparedness plan. *Long Island Lighting Company* (Shoreham Nuclear Power Station, Unit 1), ALAB-903, 28 N.R.C. 499 (1988). In *Shoreham*, the emergency preparedness plan had been litigated and licensing hearings closed. After the hearings closed, the utility conducted emergency preparedness exercises to test the plan. When the exercises revealed, according to intervenors, a fundamental flaw in the plan, the Commission initiated hearings to litigate that issue, relying on *Union of Concerned Scientists v. N.R.C.*, 735 F.2d 1437 (D.C. Cir. 1984). The *Shoreham* opinion and *Union of Concerned Scientists* establish that the statutory right to a hearing continues even after a licensing proceeding has ended, where an issue material to licensing, that is, which would be potentially harmful to the health and safety of the public, is raised. A fundamental flaw demonstrated to exist after licensing has occurred is such an issue. Further, the fundamental flaw standard enunciated in the emergency preparedness context is also applicable to issues of quality assurance in low power testing, especially when a particular event "is indicative of pervasive problems." *See Public Service Company of*

New Hampshire (Seabrook Station, Units 1 & 2), LBP-89-28, 30 N.R.C. 271, 279 (1989).

Borg-Warner check valves in the auxiliary feedwater system failed at Comanche Peak in 1985, twice in 1989 and in April and May of 1990 after licensing. This history reveals a fundamental flaw in TU Electric's plan and its assurances to the Commission that all components relating to safety would perform their design functions prior to licensing. These failures did not come to light until May 1989, when, during a hot functional test which the NRC was relying on to determine whether the plant was ready for licensing, the valves failed. The Commission discovered the valves had failed twice in 1989 and earlier in 1985. The utility had failed to report these malfunctions to the NRC in violation of 10 C.F.R. Part 50. These valves are crucial safety related components needed to mitigate the consequences of an accident and to prevent the escape of radiation into the environment.

TU Electric assured the Commission, and the NRC staff assured CFUR, that the check valves would function as designed before licensing. Yet, after licensing, during a power ascension, the same valves malfunctioned again. TU Electric now states that it may need to replace the valves outright. Thus, the commitments made by TU prior to licensing and the corrective solutions accepted by the NRC staff have not worked, and may never work, with the result that the reasonable assurance requirement of 10 C.F.R. Part 50 that components related to safety would perform their design functions, has not been met.

The record to date shows that Comanche Peak is still suffering from pervasive problems in its quality assurance and quality control plan and that fundamental flaws exist in the plans submitted by the utility to the Commission that the Commission relied on to justify a license. Had the hearings been in progress, the issue of the check valves would have been caught and corrected or no license would have issued. Only a reopening of the licensing proceedings, reestablishing an atomic safety and licensing board and allowing intervention, can now determine the extent and depth of the pervasive problems of quality assurance and quality control and the fundamental flaws of TU's corrective action plans. The failure of the Borg-Warner check valves clearly constitutes a fundamental flaw which was not corrected as a consequence of the premature cessation of the adversarial process.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A
Opinion of the United States Court of Appeals for the Fifth Circuit – April 12, 1990

CITIZENS FOR FAIR UTILITY REGULATION, Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION and the United States of America, Respondents.

Nos. 89-4124, 89-4310.

United States Court of Appeals,
Fifth Circuit.

April 12, 1990.

Petition for Review of Orders of The Nuclear Regulatory Commission.

Before WISDOM, POLITZ and JOHNSON, Circuit Judges.

JOHNSON, Circuit Judge:

In early February 1990, this Court denied a motion to stay proceedings filed by Citizens For Fair Utility Regulation (CFUR). CFUR's motion requested that the issuance of an operating license for the Comanche Peak Nuclear Power Plant be stayed pending this Court's decision on the merits. Our denial was predicated on a determination that CFUR had failed to demonstrate a substantial likelihood of success on the merits of its claim that the Nuclear Regulatory Commission (NRC) erroneously denied CFUR's late-filed motion to intervene in the licensing proceedings. Texas Utilities Electric Co., et al. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-88-12, 28 NRC 605, 607 (1988) (hereinafter CLI-

88-12); 10 C.F.R. §§ 2.714(a)(1)(i-v). We turn now, in this opinion, to address the merits of CFUR's claim.

I. FACTS AND PROCEDURAL HISTORY

CFUR is a Tarrant County based public interest organization "representing a broad base of citizens whose primary concerns are safe, affordable and environmentally sound energy. Since its founding in 1976, CFUR has been dedicated to environmental and energy education." Petitioner's Brief at 5-6. In 1979, CFUR was granted intervenor status in Comanche Peak's licensing proceeding. At the same time, Citizens Association for Sound Energy (CASE) and Association of Communities for Reform Now (ACORN) were also granted intervenor status.[1] ACORN later withdrew from the proceedings in 1981. CFUR withdrew from the proceedings on April 2, 1982. The proceedings continued with CASE as the sole intervenor.

By 1984, the proceeding had resolved all contentions with the exception of one relating to Quality Control / Quality Assurance (QC/QA) in the construction of the plant. On June 28, 1988, CASE and TU Electric reached a settlement agreement terminating the existing pro-

[1]The NRC provides a two-stage agency process for consideration of those aspects of licensing a nuclear power plant related to protecting public health, safety and the environment. 42 U.S.C. § 2011 *et seq.*; 42 U.S.C. § 4321 *et seq.* On February 28, 1978, Texas Utilities Electric Company (TU Electric), the owner of the Comanche Peak station, filed an application for a license to operate Comanche Peak. The Atomic Energy Act requires a hearing on a construction permit application but permits the NRC to issue an operating license in the absence of an adjudicatory hearing if one is not requested. An adjudicatory proceeding commences when the NRC publishes notice of proposed action in the Federal Register. The notice includes a time period during which interested persons may file a request for a hearing or file a petition for leave to intervene. 10 C.F.R. §§ 2.105(d); 2.714(a)(1). CFUR, CASE, and ACORN filed timely petitions to intervene.

ceedings.[2] Consequentialy, CASE, TU Electric, and the NRC staff submitted a joint motion to dismiss the proceedings as settled. On July 13, 1988, the Licensing Board held a public meeting. After receiving comments from the parties and interested members of the public, the Board issued an order dismissing the proceedings.

On August 11, 1988, CFUR filed a late petition before the Atomic Safety and Licensing Board seeking to intervene in the Comanche Peak proceedings. At the time of this filing, CFUR's petition was filed nine years out-of-time, six years after CFUR's voluntary withdrawal, and a month after the hearings had been dismissed. CFUR filed two supplements to its initial petition. In the first, CFUR alleged that Joseph J. Macktal, intervenor in the instant case, had expresed safety concerns but was prevented from raising them because of an illegal agreement between the Comanche Peak contractor, Brown & Root, and CASE attorneys.[3] In the second supplement, CFUR alleged that TU Electric had used certain materials in the construction of the station in violation of both the

[2] CFUR's brief points out that this settlement marks the first time an intervenor (CASE) in a nuclear power plant licensing proceeding has received financial remuneration in the context of a settlement agreement.

[3] On December 16, 1989, Macktal filed a Petition to Intervene in the CFUR proceeding on a limited issue concerning the nature of the settlement agreement. We note here that this issue has become moot. The NRC has withdrawn any comment on the legality of Macktal's settlement agreement and indicated that its decision to deny CFUR's petition was independent of the validity of that agreement. Memorandum and Order CLI-88-06. Subsequent to the issuance of CLI-88-06, the Secretary of Labor ruled on the validity of the disputed provision, found it void against public policy, and severed that provision. Macktal v. Brown & Root, Inc., Docket No. 86-ERA-2332, Order Rejecting in Part and Approving in Part Settlement Between the Parties and Dismissing Case at 10-11 (Nov. 11, 1989). Consequently, Macktal's claim that he may be prejudiced by the NRC's interpretation of this agreement is moot.

manufacturer's directions and the approved design of Comanche Peak.

On December 21, 1988, the NRC, concluding that CFUR's petition failed to satisfy the five-factor test governing late-filed petitions for intervention, denied the petition to intervene. Texas Utilities Electric Company, CLI-88-12; 10 C.F.R. § 2.7 4(a)(i-v).

The NRC may exercise its discretion to grant a late-filed petition if it finds that a favorable showing has been made on the following five factors:

> 1. good cause for failure to file on time;
>
> 2. the availability of other means whereby the petitioner's interest will be protected;
>
> 3. the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record;
>
> 4. the extent to which the petitioner's interest will be represented by existing parties; and
>
> 5. the extent to which the petitioner's participation will broaden the issues or delay the proceeding.

The burden is on the petitioner to demonstrate that a balancing of these factors weighs in favor of granting the untimely petition. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327 (1985). If the petitioner fails to show good cause for failure to file on time, then the petitioner is bound to make a compelling showing of the remaining four factors before intervention is proper. *See, e.g.*, Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387 (1983); Nuclear Fuel Services,

Inc. (West Valley Reprocessing Plant) CLI-75-4, 1 NRC 273 (1975).

In support of its petition, CFUR alleged that it withdrew from the proceedings due to a financial inability to continue and in reliance on the assumption that CASE would continue to litigate the proceedings. CFUR further argued that it had no alternative means to protect its interest and that it could make important contributions to the record. Finally, CFUR argued that allowing it to intervene would not delay the proceedings which were dismissed prior to CFUR's petition to intervene.

The NRC concluded that CFUR had failed to demonstrate good cause for the late filing of the petition to intervene. The NRC then determined that CFUR had failed to make a compelling showing on the remaining four factors. While the NRC did find that two of the four factors (the availability of other means of protecting the petitioners' interest and the extent to which the petitioner's interest will be represented by existing parties), the NRC found that the remaining factors weighed heavily against CFUR. Accordingly, the NRC denied the petition to intervene based on CFUR's failure to make a compelling showing on the remaining factors.

CFUR now urges this Court to find that the NRC abused its discretion by finding that CFUR had failed to meet the five requirements for intervention under 10 C.F.R. § 2.714; we decline to do so.

II. DISCUSSION

[1] In reviewing agency action, this Court will defer to agency judgement unless the action is "arbitrary, capri-

cious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *See, e.g., Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983). This standard is even more deferential where, as here, a Court is reviewing an agency's application and interpretation of its own regulations. *See, e.g., Robertson v. Methow Valley Citizens Council*, ___ U.S. ___, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989).

[2] CFUR bases its argument as to the first factor, good cause, primarily on CFUR's previous participation and subjective reliance on CASE's continued participation. CFUR points out that "CASE, as a tax-exempt organization, had been more successful in fundraising, and since CFUR had not established itself as a tax exempt organization, CASE was likely to be in a better position to raise funds for a combined effort. CFUR decided to withdraw in favor of CASE." Petitioners Brief at 8. CFUR further argues that the settlement agreement between CASE and TCU Electric was unprecedented and that CFUR had no indication that such action might occur.

While this Court does not doubt the veracity of CFUR's allegation of surprise at CASE's settlement, such action on the part of CASE, in and of itself, does not create good cause for CFUR's late-filed petition to intervene. NRC precedent consistently and clearly indicates that a potential intervenor cannot rely on another intervenor to present a certain view or represent certain interests without assuming the risk that the intervenor will not do so. *See, e.g.*, Gulf States Utilities Company (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC

760 (1977); *Easton Utilities Commission v. AEC*, 424 F.2d 847 (D.C.Cir.1970). CFUR argues that *River Bend* and *Easton* are not appropriate authority for the instant case because of the extensive prior involvement of CFUR in the proceedings. We do not agree. While CFUR did participate in the early stages of the proceedings, it withdrew in 1982, some six years before the ultimate settlement. At the time of the filing of the petition to intervene, CFUR was a legal stranger to the action.[4] As the NRC succinctly stated, "CFUR assumed the risk that CASE would not represent its interest to its complete satisfaction when it withdrew from the proceedings in 1982. It cannot now complain when that risk becomes reality." CLI-88-12 at 6.

CFUR next argues that, even in the absence of a determination of good cause, the NRC abused its discretion by failing to find that a compelling showing in support of intervention had been made as to the remaining four factors. The NRC did find in CFUR's favor on two of the four factors; however, the NRC concluded that the remaining two factors weighed heavily against CFUR. The NRC concluded that CFUR had failed to make a compelling showing, and we cannot conclude that this determination was an abuse of discretion.

[3] In analyzing the third factor, the ability to contribute to a sound record, NRC pointed to CFUR's six year absence from the proceedings and to CFUR's failure to point with specificity to any specific accomplishments

[4] CFUR also argues that the circumstances imply a "sound foundation" for replacement because of the existence of the Macktal agreement. As we noted in footnote 3, the issue involving that agreement is moot; CFUR cannot rely on such an agreement to establish good cause for its late-filed petition.

during its tenure as a participant or to any potential witnesses it intended to call at the hearings. Specificity is inherently necessary in order to allow the NRC to weigh the equities to determine if a compelling showing has been made. Without specificity, the NRC is forced to act as a mystic when determining if the potential intervenor has demonstrated a true ability to contribute to the record or is merely attempting to step in to delay the proceedings or otherwise act as a nuisance intervenor. The Appeal Board has stressed the importance of specificity as to this factor. Mississippi Power and Light Company (Grand Gult [sic] Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725 (1982).

In light of the lack of specificity provided by CFUR, the NRC concluded that this factor weighed heavily against the petitioner. This attribution of weight was not an abuse of discretion.[3]

[4] Finally, CFUR has failed to demonstrate that it would not delay the proceedings or broaden the issues. CFUR's petition was filed after the proceedings had been dismissed; CFUR has been absent from the proceedings for six years; and the petition filed by CFUR indicates that, at least in the area of QC QA, CFUR will attempt to raise additional concerns.

Based on the foregoing, we cannot say that the NRC abused its discretion in finding that CFUR failed to make

[3] Balancing this factor against CFUR is further supported by CFUR's failure to address the issues raised by the Licensing Board in earlier proceedings. Prior to this petition, CFUR filed a petition to intervene which the Licensing Board permitted to be withdrawn without prejudice. In doing so, the Board indicated several areas which CFUR should address in order to demonstrate CFUR's ability to contribute to a sound record. CFUR did not fully address these issues.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:
Lando W. Zech, Jr., Chairman
Thomas M. Roberts
Kenneth M. Carr
Kenneth C. Rogers
James R. Curtiss

In the Matter of

TEXAS UTILITIES ELECTRIC COMPANY, *ET AL.*	Docket Nos. 50-445-OL 50-446-OL
(Comanche Peak Steam Electric Station, Units 1 and 2)	Docket No. 50-445-CPA

MEMORANDUM AND ORDER

CLI-88-12

I. Introduction and Summary

On August 11, 1988, the organization Citizens for Fair Utility Regulation ("CFUR" or "Petitioners") filed a late petition before the Atomic Safety and Licensing Board seeking to intervene in the Comanche Peak Operating License ("OL") and Construction Permit Amendment ("CPA") proceedings. This filing presents a somewhat unusual situation because the Licensing Board which was conducting those proceedings dismissed both cases on July 13, 1988, approximately four weeks earlier, act-

ing on a joint motion filed by all parties pursuant to a settlement agreement. The NRC staff and the applicant, Texas Utilities Electric Company ("TUEC") filed their responses with the Commission rather than with the Licensing Board, in the apparent belief that the Commission had sole jurisdiction over the petition. The Licensing Board has not acted on CFUR's petition–not even to the extent of ruling on the threshold question of whether it has jurisdiction to entertain the petition. In light of the Licensing Board's inaction, and in order to clarify any resulting confusion regarding the status of the Comanche Peak facility, the Commission has elected to rule on the petition itself.[1] Upon review, we find that the petition fails to satisfy the five-factor test for late-filed intervention petitions set forth in 10 C.F.R. 2.714(a)(i-v). Therefore, we deny the petition to intervene.

II. CFUR's Petition

CFUR was one of three original intervenors in this proceeding, having been admitted to the proceeding on June 27, 1979. CFUR and the second intervenor withdrew from the proceeding in 1982, leaving the Citizens Association for Sound Energy ("CASE") as the only party contesting the issuance of the operating license. In this petition, CFUR alleges that it withdrew from the proceeding on the assumptions that (1) it would support

[1]Resolution of this question has been delayed by a series of questionable judgments by the parties and the Licensing Board. Initially, the petitioners filed their petition before the Licensing Board which had been hearing both Comanche Peak proceedings despite the Licensing Board's clear statement during a public proceeding the day before it dismissed the case that any such petition should be directed to the Commission. *See* Transcript at 25,202-08. Whether that advice was correct in this case is a question we need not reach in view of our decision to rule on the petition ourselves.

CASE's efforts and (2) CASE would diligently prosecute the proceeding against Comanche Peak.[2] CFUR further alleges that CASE does not intend to implement the oversight functions of the settlement agreement which allow a CASE representative: (1) to monitor construction and operation of the plant as a member of TUEC's Operations Review Committee; and (2) to report any perceived problems to the NRC as necessary. Accordingly, in CFUR's view, CASE cannot be relied upon to uphold the public's interest in a safe plant.

As a result, CFUR argues that it is now entitled to replace CASE as an intervenor in the proceeding because CASE has failed to carry out the above assumptions upon which CFUR acted, contrary to CFUR's wishes. According to the petition, if CFUR had known that CASE might withdraw from the proceeding, it would not have withdrawn. Therefore, argues CFUR, good cause exists to grant the late-filed petition to intervene.[3]

Furthermore, CFUR alleges that it has no alternative means other than intervention to protect its and the public's interests, that it can make important contributions to the record, that no other parties are available to represent CFUR's interests, and that allowing CFUR to

[2] CFUR alleges that its reliance upon CASE was "reasonable." We accept this characterization although, as we will demonstrate, it is irrelevant for our purposes.

[3] CFUR's allegations include: a breakdown of QA QC procedures at the plant; the existence of unspecified life-threatening safety flaws; perjury by the applicant's employees or agents; falsification of documents and engineering calculations by the applicant; hazardous insulation used in the plant; invalid hydrostatic testing; poor quality pipe coating; inadequate recordkeeping; and defective welds in the spent fuel pool liner.

intervene will not delay the proceedings which were dismissed by the Licensing Board on July 13, 1988.

III. Analysis

A. The Applicable Standard

In order to prevail, CFUR must satisfy a balancing of the five requirements for an "untimely" or "late-filed" petition found in 10 C.F.R. 2.714 (a)(1)(i-v).[4] Those five factors are:

> (1) the "good cause" for failure to file on time; (2) the availability of other means of protecting the petitioners' interests; (3) the extent to which the petitioners' participation may reasonably be expected to assist in developing a sound record; (4) the extent to which the petitioners' interest will be represented by existing parties; and (5) the extent to which the petitioners' participation will broaden the issues or delay the proceeding.

The burden is on the petitioner to satisfy the Commission that a balancing of these factors weighs in favor of granting the petition. *Metropolitan Edison Company* (Three Mile Island Nuclear Power Station, Unit 1), CLI-83-25, 18 NRC 327, 331 (1983).[5]

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[4]The NRC Staff concedes that CFUR satisfies the standing and interest requirements found in 10 C.F.R. 2.714. *See* NRC Staff response at 7-8. We agree. Thus, we will confine our analysis to the five-factor lateness test.

[5]In preparing this order, we have reviewed both CFUR's initial petition and its "First Supplement" together with the responses to both documents filed by both the NRC Staff and the Applicant, TUEC. We have totally disregarded the letter filed by the Nuclear Management and Resources Council ("NUMARC") dated October 7, 1988. NUMARC is not a party to this proceeding and has not sought to participate under Commission regulations. Organizations which wish to present their views on the record should properly seek leave to intervene or leave to participate as an *amicus*. *See* 10 C.F.R. 2.715 (1988).

B. Factor (i): "Good Cause" For Late Intervention

Long-standing and well-settled Commission precedent clearly holds that one party may not demonstrate "good cause" for late intervention by attempting to substitute itself for another party which has withdrawn from the proceeding. *See, e.g., Gulf States Utilities Company* (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 795-98 (1977) ("*River Bend*"). In that case, the Union of Concerned Scientists attempted to replace the State of Louisiana after the State decided to withdraw from the proceeding, arguing that the organization and its members had been "lulled into inaction" by the State's previous participation. 6 NRC at 796. The Appeal Board rejected that argument, holding that the belated petitioners assumed the risk that the previous litigant's degree of involvement would not fulfill their expectations and that "a foreseeable consequence of the materialization of that risk was that it would no longer be possible to undertake [themselves] the vindication of [their] interests." 6 NRC at 797, *quoting Duke Power Company* (Cherokee Nuclear Station, Units 1, 2, and 3), ALAB-440, 6 NRC 642, 645 (1977) ("*Cherokee*"). In essence, a potential intervenor may not rely upon an existing intervenor to present its views or represent its positions without assuming the risk that they will not do so.

Furthermore, the U.S. Court of Appeals for the District of Columbia Circuit has specifically upheld the Commission's denial of late intervention in similar circumstances. "We do not find in statute or case law any ground for accepting the premise that proceedings before administrative agencies are to be constituted as endurance contests modeled after relay races in which

the baton of proceeding is passed on successively from one legally exhausted contestant to a newly arriving legal stranger." *Easton Utilities Commission v. AEC*, 424 F.2d 847, 852 (D.C. Cir. 1970).

Clearly, this case is analogous to the *River Bend*, *Cherokee*, and *Easton* cases. In each of these cases, the intervenors attempted to claim a "right" to substitute themselves for parties who have withdrawn from the proceedings. Obviously, however, a party has no "right" to substitute itself into a proceeding. Instead, each party must demonstrate that it is entitled to intervene on its own merits. Any previous reliance–however misplaced–on another party to assert its interests does not in and of itself constitute sufficient "good cause" to justify late intervention. Like the petitioners in *River Bend* and *Cherokee*, CFUR assumed the risk that CASE would not represent its interests to its complete satisfaction when it withdrew from the proceeding in 1982. It cannot now complain when that risk becomes reality.[6] Thus, the claim that CFUR relied upon CASE to represent its interests in the hearing does not constitute "good cause" for late intervention and the first factor weights against granting the petition.

C. Analysis of Factors (ii) through (v)

We now turn our attention to the remaining four factors against which we must weigh the petition. When the intervention is extremely untimely and the proceeding has been essentially completed, as is true in this case,

[6]The fact that various members of CASE may have disagreed with the course of action taken by the majority of CASE's membership or directors does not add any support to CFUR's petition. Obviously, in any organization, there can be as many points of view as there are members.

and the petitioner utterly fails to demonstrate any "good cause" for late intervention, it must make a "compelling" case that the other four factors weigh in its favor. *See, e.g., Long Island Lighting Company* (Shoreham Nuclear Power Station, Unit 1), ALAB-743, 18 NRC 387, 397 (183) ("*Shoreham*"); *Detroit Edison Company* (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-707, 16 NRC 1760, 1765 (1982); *South Carolina Electric and Gas Company* (Virgil C. Summer Nuclear Station, Unit 1), ALAB-642, 13 NRC 881, 886 (1981), *aff'd sub nom. Fairfield United Action v. NRC*, 679 F.2d 261 (D.C.Cir. 1982) (Table). As we will demonstrate, we find no compelling case here.

The NRC staff concedes that factors (ii) and (iv) weigh in favor of the petitioner and we agree. Turning to the third factor, the ability to contribute to a sound record, we find that CFUR has been absent from the proceedings for six (6) years. There is no evidence that it has any knowledge of the nature of the factual background or specific issues involved in Contention 5 at issue in the OL Proceeding or Contention 2 at issue in the CPA proceeding.[7] Furthermore, and most importantly, it has identified no special expertise or experience which its members possess which would enable it to address those issues. The only factor cited is a vague reference to participation in the prior proceedings before it withdrew as a party. However, CFUR does not provide us with any

[7] Throughout both the Petition and the "First Supplement" CFUR has repeatedly ignored the CPA proceeding and has failed to address Contention 2 admitted in that proceeding. While we will treat the petition as filed in both proceedings, we note that what little substance CFUR's submittals contain refer exclusively to the OL proceeding, not the CPA proceeding. Therefore, any showing in favor of CFUR's intervention in the OL proceeding is absent in the CPA proceeding.

specific accomplishment in those hearings which would demonstrate any significant expertise.

Moreover, CFUR has not identified any witnesses it intends to call at the hearings which it proposes, much less any experts in the areas which were at issue in either the OL or CPA proceeding. Additionally, CFUR's issues appear to be simple, unspported disagreements with statements in various NRC documents such as inspection reports. *See* Petition at 14-15. The Appeal Board has repeatedly stressed the importance of providing specific and detailed information in support of factor (iii). "When a petitioner addresses this [third] criterion it should set out with as much particularity as possible the precise issues it plans to cover, identify its prospective witnesses, and summarize their proposed testimony." *Mississippi Power & Light Company* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-704, 16 NRC 1725, 1730 (1982); *Shoreham*, 18 NRC at 399. In the circumstances of this case, CFUR would need to be very precise and detailed regarding the issues it intends to raise and how it intends to address them. Having failed to do so, this factor weighs heavily against intervention.

Regarding factor (v), we find that there will be an inevitable delay while CFUR acquaints itself with the proceedings. Although CFUR alleges that it "is fully prepared to take the proceedings as it finds them," *see* Petition at 19, we find that promise of questionable value. CFUR's members have not been involved with the proceedings for over six (6) years. The petition indicates that CFUR apparently has no knowledge of the extensive proceedings which have occurred after 1982. For example, CFUR's primary reference to the extensive

corrective programs undertaken by TUEC at Comanche Peak such as the CPRT and the CAP is a quote from a 1987 CASE newsletter. *See* Petition, Attachment G. Additionally, CFUR makes no reference to the extensive evaluations by the NRC staff which have resulted in the various Project Status Reports and the Supplemental Safety Evaluation Reports. Obviously, evaluation of these documents (among many others) would be central to understanding the status of the plant's construction and the current posture of the licensing process. Yet the petition contains no evidence that CFUR has even commenced such a review. Therefore, we find no evidence in the petition that CFUR could immediately step into both proceedings without a substantial delay.

Furthermore, CFUR appears to be attempting to broaden the issues in dispute before the two proceedings. Contention 5 at issue in the OL proceeding alleges that TUEC employed inadequate Quality Assurance / Quality Control ("QA/QC") procedures during plant construction. Contention 2 at issue in the CPA proceeding alleges that TUEC deliberately violated NRC regulations in order to speed construction. However, CFUR raises issues which appear to go beyond those two areas. *See* Note 3, *supra*. Expansion of the hearings to cover these issues would undoubtedly delay the proceedings.

IV. CFUR's Supplemental Pleading

In its "First Supplement," CFUR alleges that TUEC and CASE have conspired to enter into "illegal settlement agreements" resolving at least one of the Department of Labor ("DOL") employment discrimination cases concerning retaliation against alleged "whistleblowers."

CFUR seeks a hearing to explore these claims. In addition to widening the scope of the proceedings, *see* factor (v), *supra*, these allegations do not constitute grounds for ordering a hearing.[5] We read the agreement referenced in the CFUR's supplemental petition to allow the individual involed to bring any safety concerns he has directly to the NRC, either on his own behalf or on the behalf of organizations not referenced in the agreement, and to respond to an administrative subpoena if that subpoena is not quashed by the issuing officer. In its response, TUEC concedes as much. *See* Applicant's Response to CFUR's Fist Supplement at 8. Moreover, at the prehearing conference discussing the settlement agreement (at which CFUR was present) counsel for both CASE and TUEC pointed out that none of those individuals involved in settlement agreements before the DOL were barred from bringing concerns to the NRC. *See* Transcript at 25,257; 25,268. The agreement referenced in the CFUR petition only restricts the individual's right to appear voluntarily as a *witness* or a *party* in certain NRC proceedings (and then only on behalf of the organizations and individuals listed in the agreement) and obligates the individual to take "reasonable" steps to resist a subpoena in such proceedings. As long as the individual's right to bring matters to the NRC in a reasonably convenient manner is not curtailed, we do not see a violation of federal law or NRC regulation.

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[5]CFUR's allegations in this regard appear directed not at CASE itself, the NRC, or even TUEC or its contractors, but at the attorneys who represented CASE before the NRC and, coincidently, the specific individual before the Department of Labor. These allegations concern actions performed in their role as a representative before the DOL. Therefore, the proper forum for these complaints is likely not the NRC. According to an exhibit attached to CFUR's "First Supplement," we understand that the individual involved is pursuing this question before the DOL.

V. Summary

In summary, CFUR has failed to justify the lateness of the petition and has not carried its "compelling" burden of balancing the last four factors. Accordingly, the petition to intervene must be and hereby is denied.[9]

It is so ORDERED.

For the Commission,

/s/ JOHN C. HOYLE
Assistant Secretary for
the Commission

Dated at Rockville, Maryland
21st day of December, 1988.

[9] On the day before the Commission was to vote on this order, the Commission received a "Second Supplement" to the Petition to Intervene from CFUR. The Supplement alleges various inadequacies in the installation of Kapton insulation at the Comanche Peak facility. This extremely late pleading does not contain any evidence or information which would change our decision on the outcome of the petition to intervene.